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IN THE SUPREME COURT OF THE STATE OF IDAHO

KEYBANK NATIONAL ASSOCIATION, a national banking association,

Plaintiff/Respondent,

v.

PAL I, LLC, an Idaho limited liability company,

Defendant/Appellant.

Supreme Court Docket No. 38645-2011

APPELLANT'S REPLY BRIEF ON APPEAL

Appeal from the District Court of the Seventh Judicial District for Madison County.
Honorable Gregory W. Moeller, District Judge, presiding.

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Appellant,
PAL I, LLC, an Idaho limited liability company

Thomas E. Dvorak, Esq., and Amber N. Dina, Esq., residing at Boise, Idaho, for Respondent,
KeyBank National Association

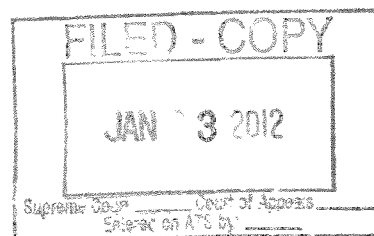


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ARGUMENT

I.

PAL'S INTERPRETATION IS THE ONLY INTERPRETATION THAT GIVES MEANING TO IDAHO CODE SECTION 11-203.

KeyBank flatly asks this Court to ignore the requirements of Idaho Code Section 11-203 by stating, "A consistent interpretation of the Idaho Code regarding attachment, levy and/or sale of secured property is that a secured creditor, by nature of its vested property right, has no duty under Idaho Code § 11-203 to file a third party claim to preserve its secured interest" ¹ KeyBank's request flies in the face of the plain language of Section 11-203 and the rule of statutory construction that requires courts to give meaning to every word of a statute.

Idaho law is clear that courts are "required to give effect to every word, clause and sentence of a statute, where possible. A rule of statutory construction is that courts will not nullify a statute or deprive the law of force or potency ***unless it is absolutely necessary.***" *Univ. of Utah Hosp. and Med. Cntr. v. Bethke*, 101 Idaho 245, 248 (1980) (internal citation omitted) (emphasis added). "That the legislature intended to . . . create a meaningless provision is an absurd result and one which we avoid." *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 268 (1981). "It is a well-settled principle of statutory construction that statutes should not be construed to render other provisions meaningless." *Moss v. Bjornson*, 155 Idaho 165, 166 (1988).

¹ See p. 24 of Respondent's Brief dated December 27, 2011, already on file herein.

The broad language of Idaho Code Section 11-203 states that “[t]he following procedures shall apply . . . to **any claim** by a third party . . . that he has a security interest [in levied property].” I.C. § 11-203 (emphasis added). The secured party “shall prepare a written claim setting forth the grounds upon which he claims the property, and in the case of a secured party, also stating the dollar amount of the claim.” I.C. § 11-203(a). The secured party “shall” deliver its claim form “to the sheriff within fourteen (14) days” after the sheriff mailed the documents to the third party. “The sheriff **shall refuse to accept or honor a claim not filed with him within that period**” I.C. § 11-203(c) (emphasis added). After the claim of exemption period has elapsed, only a court order can stop the sale of the levied property. I.C. § 11-203(c).

Here, KeyBank and the district court seek to deprive Idaho Code Section 11-203 of all force and potency, even though this result is not “absolutely necessary.” *Bethke, supra*. Neither KeyBank nor the district court offers any reasonable explanation of why it is “absolutely necessary” to construe the Legislature’s plain language in such a way as to create the “absurd result” of a statute that requires persons to claim an exemption with a specific time period for no reason at all. Adhering to the fundamental rules of statutory construction, this Court must recognize that Section 11-203 means something. KeyBank’s admitted failure to comply with Section 11-203 must mean something. This Court should reverse the district court and give meaning to Section 11-203.

//

II.

THE DISTRICT COURT'S DECISION IMPROPERLY FOCUSES ON ONE PURPOSE OF IDAHO CODE SECTION 11-203 TO THE EXCLUSION OF ITS OTHER EXPRESS PURPOSES.

PAL acknowledges that one purpose of Section 11-203 is to provide due process to debtors.² But the district court's decision and KeyBank's argument do not advance this purpose. Instead of helping debtors, the decision assists third parties to protect their security interests, which is not one of the express purposes of the statute. Worse yet, the decision impermissibly seeks to elevate the purpose of protecting debtors to the exclusion of all others.

As explained in Section 11-203's statement of purpose, U.S. District Judge Harold Ryan held Idaho's prior laws on writs of execution and garnishment to be unconstitutional. Judge Ryan's judgment outlined new procedures for sheriffs to follow. But the Legislature determined that "[t]he procedure provided in the judgment is cumbersome, expensive and time-consuming *for both creditors and sheriffs.*"³ Neither Judge Ryan's decision nor the statement of purpose indicates a concern for protecting security interests. The Legislature enacted Section 11-203 in response to the actual concerns for due process to the debtor and controlling the expense and delay to creditors and sheriffs. Section 11-203 satisfied due process by requiring notice to the debtor and providing a sufficient time to file a claim of exemption. Section 11-203 also satisfied the expense and delay concerns of creditors and

² Statement of Purpose, H 264 (Idaho 1991) (quoted on p. 8 of Respondent's Brief dated December 27, 2011, already on file herein).

³ Statement of Purpose, H 264 (Idaho 1991) (quoted on p. 8 of Respondent's Brief dated December 27, 2011, already on file herein) (emphasis added).

sheriffs by providing a simple procedure for creditors to receive an “expedited hearing” and for sheriffs to sell or return the levied property.

KeyBank provides no authority for a court to construe a statute to achieve one purpose to the exclusion of other purposes, especially when the purpose it seeks to achieve (protecting security interests) is not one of the express purposes of the statute. Thus, the district court committed reversible error by focusing on a new, implied purpose for Section 11-203 (protecting the security interest of a third party) at the expense of the express purposes of the statute (protecting the rights of the creditors and sheriff).

III.

KEYBANK’S ASSERTION OF ITS SECURITY INTEREST *IN FACT* IS IRRELEVANT UNDER IDAHO CODE SECTION 11-203 BECAUSE THAT STATUTE REQUIRES KEYBANK TO ASSERT ITS SECURITY INTEREST IN A SPECIFIC MANNER *IN LAW*.

KeyBank seeks to excuse its undisputed failure to assert its security interest in accordance with Idaho Code Section 11-203 by instead arguing that it asserted its security interest *in fact*. Specifically, KeyBank wrote letters and made telephone calls to PAL’s counsel and the sheriff asserting its security interest,⁴ but KeyBank did not deliver a claim of exemption to the sheriff within 14 days as required by Section 11-203. As explained below, assertion *in fact* is not assertion *in law*.

⁴ R Vol. I, pp. 37, 43, and 64.

In *Nicolaus v. Bodine*, 92 Idaho 639, 643 (1968), the trial court found that the county had closed a bridge without any intention of reopening it, abandoning the road *in fact*, but had failed to comply with the proper statutory procedure to abandon the road *in law*. On appeal, this Court agreed, stating that the county's conduct "was an abandonment ***in fact, but not in law.***" (Emphasis added); *see also Floyd v. Board of Commissioners of Bonneville County*, 137 Idaho 718, 729 (2002) (for county to abandon road, Court required that county "strictly adher[e] to the procedures required by law"); *Mosman v. Mathison*, 90 Idaho 76, 80 (1965) (Court considered whether the county "did in fact and in law abandon the . . . road"). The Court rejected the county's efforts to abandon the road *in fact* as insufficient, and instead required the county to abandon the road *in law*. The Court explained, "abandonment must be effectuated pursuant to I.C. § 40-501." *Id.* at 642. Importantly, by failing to comply with the formal requirements to abandon the road *in law* under Section 40-501, the county had "denied respondents their right of appeal as provided in I.C. § 40-1614." *Id.* at 643.

Just like the county's failure to abandon the road by law under Section 40-501 deprived the respondents in *Nicolaus* of their right to appeal as provided in Section 40-1614, KeyBank's failure to assert its claim *in law* under Section 11-203 deprived PAL of its right to contest that claim by motion and expedited hearing. I.C. § 11-203(b). Section 11-203 does not provide PAL the right to file a motion to contest a letter or a telephone call, but does expressly provide PAL the right to file a motion to contest a claim of exemption filed with the sheriff, and to have that motion heard on an expedited basis. *Id.* Moreover, while KeyBank's assertion *in fact* provided

notice to PAL and the sheriff, the letters and telephone calls provided no notice to buyers at the sheriff's sale who KeyBank later sued.

Other examples serve to demonstrate the significance of asserting a claim *in fact* versus asserting a claim *in law*. An attorney for a personal injury claimant may write letters and make telephone calls to potential defendants alleging liability and seeking damages for his client, thereby asserting the claim *in fact*. But if the attorney does not assert that claim *in law* by filing an action in court within the applicable statute of limitations, then the assertion *in fact* is of no legal import. See I.C. § 5-201 (civil actions can be commenced "only" by complying with limitations period).

A prevailing party in a lawsuit may demand an award of its attorney's fees and costs by writing letters and making telephone calls to opposing counsel, but if that prevailing party does not assert its claim *in law* by filing a memorandum of costs within 14 days after entry of judgment, then that party loses its right to the award. I.C. § 5-201 (party's memorandum of costs "may not be" filed later than 14 days after entry of judgment).

Similarly, an unpaid contractor may demand payment from a property owner, and assert the right to lien the owner's property in letters and telephone calls, but if the contractor does not assert that right *in law* by filing a claim of lien within 90 days after furnishing labor or services, then the contractor loses its lien rights. I.C. § 45-507(2) (claim "shall" be filed within 90 days).

Moreover, a party may file post-judgment motions challenging a judgment or verdict, thereby putting the opposing party on notice of its disagreement with the result, but if that party does not file a notice of appeal with 42 days of entry of the judgment, that party cannot continue to challenge the result. I.A.R. 14(a) (appeal made “only” by filing notice of appeal).

These statutes and rules have one important feature in common with Section 11-203: mandatory language. These laws and Section 11-203 clearly require a person to take formal action to assert a right *in law* within a prescribed time period. Compliance is mandatory. In these instances, assertion of the right *in fact* is irrelevant. The undisputed fact that KeyBank asserted its security interest *in fact* does not excuse the undisputed fact that KeyBank failed to assert its security interest *in law* under Section 11-203.

IV.

THE DISTRICT COURT ERRED BY APPLYING IDAHO CODE SECTION 28-9-315 AS THE “NEWER” STATUTE OVER SECTION 11-203 AS THE “OLDER” STATUTE.

To be perfectly clear, the Idaho Legislature enacted the current version of Section 28-9-315 in 2001. *See* S.L. 2001, ch. 208, § 1. However, Section 28-9-315 is simply a recodification of I.C. § 28-9-306(2). *See, e.g., Newgen v. OK Livestock Exchange*, 117 Idaho 445, 447 (Ct.App. 1990). The history of current Section 28-9-315 and the former 28-9-306(2) demonstrate that this law has existed in essentially the same form in all material respects since 1967. *See* S.L. 1967, ch. 161. A side-by-side comparison of the original Section 28-9-306(2) and the recodified version in Section 28-9-315 serves to illustrate their similarities:

Former Idaho Code Section 28-9-306(2)	Current Idaho Code Section 28-9-315
Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.	(a) Except as otherwise provided in this chapter and in section 28-2-403(2): (1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien . . .

As demonstrated by the verbatim language of both, there is no substantive difference in the law originally enacted in 1967. Nonetheless, KeyBank argues that “it is not the same law.”⁵ This statement is disingenuous because Section 28-9-315 is in all substantive respects the same law. Where a legislature reenacts a prior law with only a “nonsubstantive revision,” courts should not consider the reenacted law as the later of the two statutes. *Clark v. Young*, 787 S.W.2d 166, 168 (Tx.App. 1990). Section 28-9-315 simply recodifies the former Section 28-9-306(2), which has been in place since 1967. The Legislature enacted Section 11-203 in 1991. Thus, this Court should apply the newer statute of Section 11-203 over the older statute of Section 28-9-315.

Of course, this Court need apply the newer statute over the older statute only if the two statutes conflict. However, Section 28-9-315(a)(1) does not necessarily conflict with Section 11-203. The scope of Section 28-9-315(a)(1) is limited to a transaction that “creates” a security interest. I.C. § 28-9-109(a). KeyBank argues that it previously “created” a security interest in a transaction with the debtor, but the issue here—the effect of PAL’s levy on Tri-

Steel's property—is not a transaction that creates a security interest. Thus, there is no conflict because the issue in this case goes beyond the scope of Section 28-9-315 altogether.

The district court could and should have construed the two statutes harmoniously by recognizing the limited scope of Section 28-9-315(a)(1) and requiring KeyBank's compliance with the plain language of Section 11-203. However, the district court interpreted Section 28-9-315(a)(1) in a way that does conflict with Section 11-203 by holding KeyBank's security interest continued in the levied property despite KeyBank's failure to comply with Section 11-203. Since the district court interpreted them to conflict, the court should have followed the rule that "the more recently enacted statute governs," *State v. Gamino*, 148 Idaho 827, 829 (Ct.App. 2010), and required KeyBank's compliance with the more recently enacted statute, namely Section 11-203.

V.

IDAHO CODE SECTION 11-203 NEED NOT PROVIDE AN EXPRESS CONSEQUENCE FOR NONCOMPLIANCE IN ORDER FOR THIS COURT TO HOLD KEYBANK LOST ITS SECURITY INTEREST.

KeyBank argues that there is no "fair warning" in Section 11-203 that a person will lose its security interest if it fails to file a claim,⁵ so the Court should not hold that KeyBank lost its security interest by failing to comply with Section 11-203 in this case. In other words, KeyBank argues that since Section 11-203 does not expressly provide a consequence for failing to

⁵ See p. 16 of Respondent's Brief dated December 27, 2011, already on file with the court.

⁶ See, e.g., p. 14 of Respondent's Brief dated December 27, 2011, already on file with the court.

comply, there should be no consequence for failing to comply. KeyBank's argument finds no support in Idaho law.

A statute requiring a mandatory act need not expressly state the consequence for failing to perform that act in order for there to be a consequence. For example, Idaho Rule of Civil Procedure 8(c) states, "In pleading to a preceding pleading, a party **shall** set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Rule 8(c) does not expressly state a consequence for a party's failure to plead its defense of statute of limitations. Nonetheless, this Court has repeatedly held that failure to plead that affirmative defense constitutes a waiver and the defendant loses the right to assert that defense. *Cole v. State*, 135 Idaho 107, 110 (2000) (quoting *Anderson v. State*, 133 Idaho 788, 791 (Ct.App. 1999) (citing I.R.C.P. 8(c) and *Resource Engineering, Inc. v. Siler*, 94 Idaho 935 (1972))). A defendant might argue that Rule 8(c) does not provide "fair warning" of the waiver since the rule does not expressly state that a defendant loses this defense if not pled, but this would not prevent a court from holding the defendant lost its right to assert the statute of limitations defense.

Both Rule 8(c) and Section 11-203 contain mandatory language requiring persons to assert their rights in a specific way. Just as Rule 8(c) states that "a party **shall** set forth" its defense of statute of limitations in its responsive pleading, Section 11-203 states that a third party claiming a security interest in levied property "**shall** prepare a written claim . . . stating the dollar amount of the claim," and the claim "**shall** be delivered or mailed to the sheriff

within fourteen (14) days.” I.C. § 11-203. Neither Rule 8(c) nor Section 11-203 contains an express consequence for failure to comply. However, just as a court properly holds that a party loses its right to assert the statute of limitations defense by failing to comply with the mandatory requirements of Rule 8(c), this Court can properly hold that KeyBank lost its right to assert its security interest by failing to comply with the mandatory requirements of Section 11-203.

This result is particularly fair under Section 11-203 because Section 11-203 does provide fair warning by explaining that a sheriff shall refuse to accept or honor a claim not timely filed and shall proceed to sell the property and deliver the proceeds to the creditor. I.C. § 11-203(c). The result is also fair because the requirements of Section 11-203 are not burdensome, especially since the sheriff provided KeyBank with the claim form and instructions on how and when to file the claim. All KeyBank had to do was check a box, sign the form, and mail it back to the sheriff. For whatever reason, KeyBank either failed or refused to follow the law and the sheriff’s instructions.

Finally, KeyBank argues that the absence of an express consequence under Section 11-203 “demonstrates the Idaho Legislature did not intend filing a third party claim under Idaho Code § 11-203 to be mandatory.”⁷ However, KeyBank’s argument is contrary to the plain language of Section 11-203 and undermined by the legal reality that courts impose consequences for failure to comply with mandatory law even when the statute provides no

express consequence. The Court should reject KeyBank's ongoing suggestion to construe Section 11-203 in a way that renders it meaningless.

VI.

ATTORNEY'S FEES.

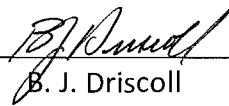
PAL renews its request for an award of attorney's fees and costs. I.C. § 12-120(1); I.A.R. 40; I.A.R. 41.

CONCLUSION

Based on the foregoing, this Court should reverse the district court's decision granting summary judgment to KeyBank and remand the case with instructions to enter summary judgment in favor of PAL. The Court should also award PAL its costs and attorney's fees incurred below and on appeal.

RESPECTIVELY SUBMITTED this 20 day of January, 2012.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 
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Attorneys for Appellant,
PAL I, LLC

⁷ See p. 16 of Respondent's Brief dated December 27, 2011, already on file with the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of January, 2012, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

- ☒ U.S. Mail
- ☐ Facsimile Transmission
- ☐ Overnight Delivery
- ☐ Hand Delivery

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